

# Arent Fox

April 14, 2010

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**VIA HAND DELIVERY**

Office of the Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Room TW-A325  
Washington, D.C. 20554

**Re: *In the Matter of Comtel Telcom Assets LP d/b/a Excel Telecommunications v. Hypercube Telecom, LLC*, File No. EB-09-MDIC-0028**

Dear Secretary Dortch:

On behalf of Hypercube Telecom, LLC, I enclose for inclusion in the above-referenced docket an original and four copies of a letter that I sent today to the Commission's Ms. Bridgham and Mr. Engel in connection with that proceeding.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Michael B. Hazzard

cc: James H. Lister, Esq. (via hand delivery and email)  
Ms. Bridgham (via email and U.S. Mail)  
Mr. Engel (via email and U.S. Mail)

Enclosure

# Arent Fox

April 14, 2010

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## VIA HAND DELIVERY AND EMAIL

Tracy Bridgham, Esq.  
Michael Engel, Esq.  
Market Disputes Resolution Division  
Enforcement Bureau Federal Communications Commission  
445 12th Street, S.W.  
Room TW-A325  
Washington, D.C. 20554

**Re: *In the Matter of Comtel Telecom Assets LP d/b/a Excel Telecommunications v. Hypercube Telecom, LLC*, File No. EB-09-MDIC-0028**

Dear Ms. Bridgham & Mr. Engel:

On behalf of Hypercube Telecom, LLC ("Hypercube"), I write in connection with the pending Motion for Extension of Time that Comtel Telecom Assets LP d/b/a Excel Telecommunications ("Excel") filed in the Informal Complaint proceeding referenced above on March 19, 2010. After Hypercube timely opposed that motion on March 29, 2009, new events have transpired that bear on the Bureau's disposition of Excel's Motion for Extension of Time.

Specifically, on March 31, 2010, the Wireline Competition Bureau issued a Public Notice soliciting comments on a Domestic Section 214 Application Filed for the Acquisition of Assets of Comtel Telecom Assets L.P. and Comtel Virginia LLC by Matrix Telecom, Inc. and Matrix Telecom of Virginia, Inc., WC Docket No. 10-82 (filed Mar. 22, 2010). Public Notice, DA 10-53 (rel. Mar. 31, 2010). According to the Public Notice (and Excel's underlying Section 214 Application), the proposed transaction contemplates Matrix and Matrix-VA acquiring "substantially all of the telecommunications customers and assets of Comtel and Comtel-VA." Public Notice, DA 10-53, at 1. Moreover, the Wireline Competition Bureau found that, upon initial review, the Excel/Matrix Section 214 application "is acceptable for filing as a streamlined application." *Id.* at 2.

Thus, at the same time that Excel is asking the Enforcement Bureau to *delay* the time in which Excel would have to convert its informal complaint to a formal complaint (and thus effectively extend the statute of limitations on whatever specious claims it thinks it has in its informal complaint but would rather not attempt to prove), Excel has also asked the Wireline Competition Bureau to *expedite* the approval of the sale of "substantially all" of its "telecommunications customers and assets."

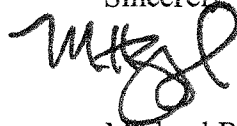
## Arent Fox

Put plainly, Excel is doing everything it can to hurry out of the telecommunications business, and not expend any money or effort on its frivolous informal complaint that it filed against Hypercube with the Enforcement Bureau in a transparent effort to disrupt Hypercube's otherwise straightforward filed-rate-doctrine-based collection action in federal district court. Excel's interest in stalling any effort on its informal complaint against Hypercube, which it continues to use to cloud Hypercube's case against it in court, can never satisfy the Commission's "*good cause*" standard for extending the time to convert informal complaints to formal complaints.

Hypercube's Opposition to Excel's Motion for Extension of Time details the significant and fatal legal defects in Excel's informal complaint (which will only be repeated in whatever Formal Complaint Excel may, if ever, file). Hypercube respectfully encloses a copy of its Comments filed in response to the Public Notice on Excel's Section 214 Application, which explains in greater detail why that application leaves far too many questions unanswered, and thus is not appropriate for streamlined treatment. But the answer to the question of whether Excel has shown good cause to extend the time to convert its informal complaint against Hypercube is crystal clear: Excel has no good cause. If it wants to hurry up in cashing out of the telecommunications business, it can hurry up in settling its debts before it goes. Excel's Motion for Extension of Time should still be denied.

By separate cover, a copy of this letter is being filed by hand delivery today with the Secretary's Office for inclusion in this docket. If you have any questions, please do not hesitate to contact me.

Sincerely

A handwritten signature in black ink, appearing to read "MH", with a large, stylized flourish or loop at the end.

Michael B. Hazzard

cc: James H. Lister, Esq. (via hand delivery and email)

**Your submission has been accepted**

<b>ECFS Filing Receipt - Confirmation number: 2010414033855</b>	
<b>Proceeding</b>	
<b>Name</b>	<b>Subject</b>
10-82	Application filed for the assignment of assets of Comtel Telcom assets L.P. and Comtel Virginia LLC to Matrix Telecom, Inc., and Matrix Telecom of Virginia Inc..
<b>Contact Info</b>	
Name of Filer: Hypercube Telecom, LLC	
Email Address: hazzard.michael@arentfox.com	
Attorney/Author Name: Michael Hazzard	
Lawfirm Name (required if represented by counsel): Arent Fox LLP	
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City: Washington	
State: DISTRICT OF COLUMBIA	
Zip: 20036	
<b>Details</b>	
Type of Filing: COMMENT	
<b>Document(s)</b>	
<b>File Name</b>	<b>Custom DescriptionSize</b>
Comments of Hypercube Telecom- LLC0-tif.PDF	507 KB
<b>Disclaimer</b>	
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**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554**

In the Matter of the Joint Application of

Matrix Telecom, Inc.  
Matrix Telecom of Virginia, Inc.  
Assignees,

and

Comtel Telcom Assets LP  
Comtel Virginia, LLC  
Assignors

WC Docket No. 10-82

For Grant of Authority Pursuant to Section  
214 of the Communications Act of 1934, as  
amended, and Section 63.04 and 63.24 of  
the Commission's Rules to Complete an  
Assignment of Assets of Authorized  
Domestic and International Section 214

**COMMENTS OF HYPERCUBE TELECOM, LLC**

Hypercube Telecom, LLC, by its attorneys, requests that the Federal Communications Commission ("FCC" or "Commission") remove the above-captioned Application from streamlined processing and conduct a thorough investigation to determine whether the proposed transaction is in the public interest. Hypercube is concerned that the proposed transfer of assets will allow Comtel Telcom Assets LP and Comtel Virginia, LLC to evade their obligations under the Communications Act of 1934, as amended, ("the Act") to pay for their use of the nation's telecommunications network.

The Application seeks approval of an asset purchase agreement between Matrix Telecom, Inc. and Matrix Telecom of Virginia, Inc. (collectively, "Matrix"), as putative assignees, and Comtel Telcom Assets LP and Comtel Virginia, LLC (collectively, "Comtel"), as putative assignors. Joint Application at 1-2. As a result of the transaction, Matrix "will acquire

substantially all the customers and telecommunications technology assets” currently owned by Comtel. *Id.* Hypercube submits these comments to request the Commission take action to ensure that the grant of the Application does not result in Comtel avoiding its obligations to pay for the completion of calls routed over Hypercube’s network, or result in the creation of a new, larger entity that continues Comtel’s unlawful, self-help practices.

#### **I. Comtel’s History Of Picking And Choosing Which Liabilities It Satisfies**

Over the past few years, Comtel has engaged in business practices which raise serious issues that should be addressed as part of any Section 214 approval of its sale of telecommunications assets. For instance, Hypercube currently is engaged in a protracted dispute with Comtel over its refusal to pay lawfully assessed access charges pursuant to Hypercube’s state and federal tariffs.<sup>1</sup> The dispute began in August 2007, when Comtel began withholding amounts owed for access services provided by Hypercube as an input to Comtel’s for-profit toll-free services, despite receiving payment from its toll-free customers for all calls Hypercube routed to Comtel and continues through the present. In short, Comtel is collecting revenue from its customers for providing its for-profit toll-free service without paying the costs that Hypercube – which is legally obligated to deliver calls to Comtel – incurs in delivering the toll-free calls from the end user to Comtel. Today, Comtel continues to receive, use, and benefit from Hypercube’s interstate and intrastate services and database query services without paying Hypercube for any of its services. Comtel currently owes Hypercube in excess of \$3.8 million in unpaid access charges.

As the FCC has explained, the system of access charges evolved so as to provide “a single uniform mechanism ... through which local carriers recover the cost of providing access

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<sup>1</sup> *Hypercube, LLC, et al. v. Comtel Telecom Assets LP d/b/a Excel Telecomms*, Case No. 08-cv-2298 (N.D. Tex.).

services needed to complete...telecommunications.”<sup>2</sup> Failure to pay these access charges harms the entire network because the carriers responsible for ensuring that the traffic reaches its ultimate destination are unable to recover their costs, potentially compromising the integrity of the network. Notwithstanding the lawsuit between Comtel and Hypercube that has been pending since August 2008 and in which Comtel asserted various counterclaims against Hypercube soon thereafter, Comtel has attempted to protract that proceeding needlessly and muddy the waters by filing, in September 2009, an informal complaint with the FCC that largely duplicated its counterclaims in the Texas action, 47 U.S.C. § 207’s election-of-remedies requirement notwithstanding. Thus far, however, Comtel has failed to take any action to resolve its informal complaint before the Commission, or to covert it to a formal complaint within the rule-mandated six month period. Indeed, at the same time it has sought expedited approval of its Section 214 Application, it has sought a six-month extension of time to convert its informal complaint to a formal complaint, as the rules require. As such, it is unclear whether the informal complaint before the FCC has been abandoned, or whether Comtel’s efforts to delay action on its own informal complaint is another procedural tactic designed to facilitate the sale of its assets in this proceeding or escape its liability in the Texas proceeding.<sup>3</sup>

Hypercube is not the only party to which Comtel has chosen to ignore its financial obligations. In March 2010, the FCC and Comtel entered into a Consent Decree to terminate an investigation by the Enforcement Bureau into Comtel’s “willful and repeated” failure to

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<sup>2</sup> *MTS & WATS Market Structure*, Memorandum Opinion & Order, 97 FCC 2d 682, ¶ 2 (1983).

<sup>3</sup> 47 C.F.R. § 1.718.

contribute fully and timely to the Universal Service Fund.<sup>4</sup> The Consent decree required Comtel to make a significant “contribution” (*i.e.*, to pay a fine) to the U.S. Treasury in addition to making good on all of its theretofore-ignored USF obligations. The Consent Decree with the FCC also obliged Comtel to establish a Compliance Plan to ensure its compliance with Section 254(d) of the Act and section 54.706 of the Commission’s rules. The need for the Compliance Plan and the size of the fine strongly indicate that the Enforcement Bureau felt that Comtel’s activities must be closely monitored to ensure compliance with FCC rules and the terms of the Act.

## **II. Comtel’s History Raises Questions About Whether the Proposed Asset Sale Is in the Public Interest**

Comtel’s past actions raise serious doubts as to whether the proposed asset sale is in the public interest. Pursuant to Section 214(a) of the Act, the Commission must determine whether the proposed transfer of control to Matrix of the licenses and authorizations held and controlled by Comtel is consistent with the public interest.<sup>5</sup> In determining whether a proposed transaction is in the public interest, it must consider whether the proposed sale could harm the public interest by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes.<sup>6</sup> The Commission must then employ a balancing test to determine

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<sup>4</sup> *Comtel Telcom Assets LP*, File NO. EB-08-IH-1372, NAL/Acct. No. 201032080017, FRN No. 0013838701, DA 10-418 (rel. Mar. 18, 2010).

<sup>5</sup> 47 U.S.C. § 214(a) (“No carrier ... shall acquire or operate any line ... unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the ... operation ... of such additional or extended line.”).

<sup>6</sup> *Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Communications Inc. and its Subsidiaries to FairPoint Communications, Inc.*, WC Docket No. 07-22, Memorandum Opinion & Order, FCC 07-226 (rel. Jan. 9, 2008).



whether the potential harms of the proposed transaction outweigh its potential benefits.<sup>7</sup> The applicants, here Comtel and Matrix, have the burden of proving that the proposed transaction, on balance, serves the public interest.

Comtel's recent history indicates that it is loathe to pay its fair share of the costs associated with maintaining the communications network, or even the direct costs that its for-profit services engender in other carriers. Again, Comtel has made those calculated decisions to avoid its payment obligations (after collecting its revenues) regardless of whether such payments are owed to private entities such as Hypercube or public entities such as the Universal Service Fund. Because of this, Hypercube has substantial doubts as to whether, after completion of the sale, Comtel or the entities which own it will have the inclination or financial wherewithal to make good on its obligations to Hypercube or any other carriers Excel decides it would rather not pay, particularly as it is exiting the industry altogether, making for a lopsided end-game scenario. Furthermore, it is unclear what, if any, assets Comtel will have available to satisfy its obligations once the proposed asset sale to Matrix is completed.<sup>8</sup> Allowing Comtel to escape its obligations through the sale of only its assets to a third party is clearly contrary to the public interest, and this concern should be addressed as part of the Commission's analysis of Comtel's Section 214 Application.<sup>9</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> As the Joint Application makes clear, Comtel Telcom (*a/k/a* Excel) is organized as a limited partnership that is owned by a complicated web of other corporations, partnerships and individuals resident in various states. *See* Joint Application Ex. B ("Current Corporate Organizational Structure of Assignors"). The Joint Application is silent on Comtel's intentions to maintain sufficient liquidity in Comtel Telcom following the transfer to satisfy obligations pending at the time of the transfer or that arise following the transfer.

<sup>9</sup> This concern is particularly acute here because Texas law governing limited partnerships makes it difficult to recover distributions made to limited partners. *See* Tex. Bus. Orgs. Code Ann. §§ 153.112 (Vernon 2008) (protecting distributions received by limited partners from

Despite these issues described above, Hypercube does not oppose the proposed sale of assets from Comtel to Matrix *per se*. To be clear, Hypercube has every reason to believe that Matrix is a responsible and conscientious member of the nation's telecommunications network. Rather, Hypercube proposes that the FCC take certain steps and impose certain conditions on the transaction that are consistent with the public interest and will ensure that the process is not used to avoid the debts Comtel owes to Hypercube, any other third parties, or any additional contributions Comtel may owe to the Universal Service Fund. Specifically, Hypercube suggests the FCC consider taking the following steps during its consideration of the proposed sale:

- **Removal from Streamlined Processing:** The Commission should act immediately to remove this Application from streamlined processing and initiate a further investigation as to whether this proposed transfer is in the public interest. The Commission should also consider whether or not it would be useful and appropriate to hold a public hearing on whether to permit the proposed sale of assets from Comtel to Matrix, including an inquiry into Comtel Telcom's intentions to remain sufficiently liquid such that it can satisfy any of its liabilities, contingent or otherwise, that are outstanding as of the date of transfer.

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recovery by creditors unless the limited partner knew that the distribution violated § 153.210, which prevents the distribution of partnership funds when the partnership's liabilities would exceed its total assets, or if the recovery is otherwise required by law). Here, 85.6% of Comtel is owned by a limited partner, which presumably would be entitled to the lion's share of any distribution of assets arising out of the Comtel/Matrix asset sale. *See* Joint Application Ex. B. Once distributed to the limited partner, these assets could be beyond Hypercube's recovery. In contrast, the general partner of Comtel, which under Texas law would be responsible for any and all liability of the partnership, reportedly owns only 0.95% of Comtel. Thus, the general partner's receipts from the distribution of assets would be correspondingly *de minimis* and any recovery from it by Hypercube would be limited to its remaining assets, which may not be sufficient to cover the entirety of Comtel's significant debt to Hypercube. Indeed, the corporate structure revealed in Exhibit B of the Joint Application indicates that Denham Commodity Partners Fund III LP, which owns 100% of the limited partner entity and 87.4% of the general partner entity, may have structured its business in a manner that could allow it to escape any liability for Comtel's unpaid debts. As discussed above, such an outcome is contrary to the public interest and should be addressed as part of the Commission's analysis.

- **Request Additional Information:** Before issuing any final order on the transfer of Comtel's assets to Matrix, the Commission should request, obtain and analyze in the context of the public interest additional information from Comtel, and should secure from each State Public Utility Commission within Comtel's and Matrix's areas of operation those Public Utility Commissions' conclusions regarding the issues raised herein for the Commission's careful consideration. Specifically, the Application states that Matrix will acquire "substantially all of the assets used in Comtel's provision of interstate and international communications services." Joint App. at 7. The Commission should seek clarification of what services, if any, Comtel will continue to offer after the completion of the proposed sale. The Commission should also seek clarification on how Comtel will communicate to carriers that currently have to route its traffic how routing will change if and when the transfer of its customers is approved, including whether and when Comtel will make that information known in industry databases that carriers commonly use to ascertain how to route traffic to the called party's carrier. The Commission should also inquire as to the status of any disputes between Comtel and other carriers, irrespective of the jurisdiction in which it is pending, and whether Comtel will continue to be able to satisfy its obligations to other parties for its use of the nation's communications network.
- **Condition Approval upon Settlement of Disputes:** The Commission should consider whether approval of the proposed sale should be conditioned upon the resolution of Comtel's outstanding obligations to Hypercube and any other similarly situated carriers. Comtel should not be permitted to dissolve, for all practical purposes, its existence via sale of its assets without first resolving its outstanding liabilities to third parties.
- **Establish an Escrow Fund:** If the Commission chooses to approve the sale of Comtel's assets to Matrix, it should first require Comtel to place funds sufficient to cover its debts to any and all carriers (including Hypercube) whose access charges are currently being disputed by Comtel in an escrow account. In addition, the Commission should also consider whether prudence dictates requiring Comtel to

escrow any outstanding USF obligations the company may have pursuant to the Consent Decree it entered into in March 2010.

- **Mandate Interconnection Agreements for Matrix:** In the interest of avoiding the continuation of disputes such as that in which Hypercube and Comtel are currently embroiled, the Commission should condition approval of the sale upon Matrix entering into an interconnection agreement with Hypercube and any other carriers with which Comtel is currently engaged in an access-charge billing dispute. By having interconnection agreements in place before Matrix takes over Comtel's network, future disputes can be avoided and regulatory uncertainty minimized.

These proposed remedies would avoid Commission approval of a business model that would leave carriers without remedy for Comtel's practice of reaping the profits but not paying the costs of its use of the network, or result in a new extended dispute between unpaid carriers and Comtel's successor, Matrix.

### **III. Conclusion**

For the foregoing reasons, Hypercube respectfully requests that the Commission remove this Application from streamlined processing and conduct a further investigation as to whether this transaction, as currently designed, is in the public interest. The Commission should include input from each Public Utility Commission within the footprints of Comtel and Matrix.

Hypercube also requests the Commission consider conditioning its approval of the sale of assets upon the Matrix's and Comtel's compliance with the conditions suggested above.

Dated: April 14, 2010

Respectfully submitted,

By: /s Michael B. Hazzard  
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